Supreme Court, U. S.
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AUG 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-210

JAMES A. CAPEHART, et al,

Petitioners,

v.

CITY OF CHESAPEAKE, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

Henry E. Howell, Jr.,
Howell, Anninos, Daugherty & Brown,
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Counsel for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO._____

JAMES A. CAPEHART, et al,

Petitioners,

vs

CITY OF CHESAPEAKE, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioners[1/] pray that a Writ Of Certiorari issue to review the Order entered May 12, 1975, by the Supreme Court of Virginia, refusing Petitioners

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1/ Petitioners herein are: James A. and R.D.Capehart,Ada D. and Linwood H.Grimes,Benjamin F. Wentz, Jr. and Virginia L. Wentz, J.R. and Gayle V.Anderson,Elmer C. Baggott,Jr. and Betty H.Baggott,

(hereinafter designated as "Taxpayers") an Appeal to review the final order of the Circuit Court of the City of Chesapeake entered October 16,1974,sustaining a demurrer to the application for tax relief filed by Taxpayers.

1/ (continued)
James W. and Betty Jean Blanchard, Bertie D. Brown,Thomas L. Butt, Joseph P. Cambell,Jr.,Thomas and Nell Clark,Luther and Gladys C. Credle, M. F. and Dorothy E. Credle, Ludford T. Creef,Jr. and Lorraine M. Creef,Mary E. Cross, Elmer B.Cuthrell and Dorothy A. Cuthrell, Alice S.Davis and Estate of Thomas C. Davis,Sr.,Garland and Louise Davis, John E. and Mary E. Davis, Rosa Adell Davis, Thomas C. Davis, Jr.,Annie R. DeBaun, Catherine I. Dillon,Hugh W. Etherdige, Hugh W. Etheredge, et als., Iva W.Etheredge, James M. Etheredge,Jr.,Rosa M. Faris and S.P.Hoover,William E. and Ann L. Finck,M.L.Godfrey,Jr. and Marjorie D.Godfrey, L.M.Gower,Sr. and Bertha S. Gower, James G. and Cleo H.Hall,Earl J.Harrison and Betty O.Harrison,Graham and Matilda Harrison,Graham R. and Jean Harrison, J.A. and Lille Mae Harrison,Norman L. and Alice Hedrick, Norman Ray Hollowell, Clyde and Helen H.Horner, JEH,FHB, AHJR Corporations, Walter E. and W.Stanley Jennings, Charles F.

1/ and Judith F. Johnson, John N. Kerlin and Alice W. Davis,William L.Lowry and Nellie T.Lowry,B.L. McPherson,Sr., Mac E. and Marion C.Manning,F.K. and Ruth Wirt Martin, Julian R.Melson,Irene H. and James M.Minter,Harry A. and Cora C. Moffatt,Indiana Moseley, Gary L. and Nancy L.Osmundson, Julius Osmundson,Executor of the Estate of Narcissus D.Osmundson, George E.Outten,Jr.,et als,George E.Outten,Jr., and Madylon A. Outten, Henry G. and Florence V. Parker,Randolph P.Parker,E.W. Sanders and Thelma G. Sanders, James E. and Linda D. Sawyer, Victor L.Sawyer,William C. and Margaret Sawyer, Lonnie and Eunice L. Smith, M. A. Smith (Annie M.O.Harrison), Dorsie G. Smith and Mary Anne Smith, Jimmy and Bernice L. Spencer, Chester S.Stokes, R. L. and Margaret Tebault, D.L.Thrasher and Caroline C.Thrasher, Emma P. Thrasher and D.L.Thrasher Estate, Viola Davis Torbert, Clement B. Vance Estate (Florence V. Parker, Ex.), John W. and Edna Vanluik, E. R. Voliva and Flossie M. Voliva,Algie B.Ward, Perry L. and Ruth K. Wells,Doris Ann Widmer,Leslie C.Whealton,Jr., William S. and Lille Williams, Robert C. and Corinne A. Wirt.

ORDERS AND STATUTE BELOW

The letter opinion dated October 2, 1974, of the Circuit Court of the City of Chesapeake is unreported and is printed as Appendix A, infra, p. A1-2.

The Order carrying out the Trial Court opinion dated October 16, 1974, is unreported and is printed as Appendix B, infra, p. B1-2.

The final Order of the Supreme Court of Virginia, denying Taxpayers' petition for appeal, entered May 12, 1975, is unreported and is printed as Appendix C, infra, p. C-1.

For convenience, §58-1145 of the Code of Virginia of 1950, which was the remedy pursued by Taxpayers to raise the constitutional questions involved, is printed as Appendix D, infra, p. D1-2.[2/]

2/ Following the filing of the instant application for relief, the General Assembly amended 58-1145 to substitute "that the assessment is otherwise invalid or illegal" for "if the court in its discretion finds the ends of justice would be met by making an adjustment", for the Supreme Court of Virginia had in City of Waynesboro v. Keiser, 213 Va. 229, 191 S.E.

JURISDICTION

Taxpayers' Application For Relief attacked the constitutionality of a piecemeal segmental system of assessing real estate in the City of Chesapeake, alleging said assessments were not uniform in application and were unconstitutional under the Constitutions of the Commonwealth of Virginia and the United States. (Application, Appendix E, paragraphs "Second" and "Third", infra, p. E2-3).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the failure of the City of Chesapeake to provide an annual uniform assessment of real estate within its boundaries pursuant to the mandate of its Ordinance produce an intentional lack of uniformity in taxation that violated Taxpayers' constitutional rights to due process and equal protection of the law?

2/ (continued)
2d 196 (1972), condemned the former language for vagueness. The amendment did not affect Taxpayers' rights.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

In 1964 the City of Chesapeake enacted §10-44 of the Code of the City of Chesapeake, Virginia, which provides as follows:

> "Sec. 10-44. Annual assessment of real estate required.
>
> "There shall be an annual assessment of real estate for local taxation in the city, which shall be made as provided in this article. (6-23-64, §1.) (Code of the City of Chesapeake, Virginia, Article V. Assessments, §10-44, p. 110).

Taxpayers submit that the City's breach of this requirement produced a lack of uniformity in the tax burden placed upon real estate in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws." 3/

STATEMENT OF THE CASE

The constitutional question was first raised by Taxpayers' initial pleading, which petitioned the Circuit Court of Chesapeake to adjudicate that the said assessments are not uniform in application, are erroneous under the laws of Virginia and unconstitutional under the Constitutions of the Commonwealth of Virginia and the United States. (Application, Appendix E, paragraphs "Second" and "Third",infra, p.E2-3.)

The Application averred that in 1964 the City of Chesapeake enacted §10-44 of its Code, supra, mandating an annual assessment of real estate for local taxation; that thereafter an assessment of all properties was made and a uniform taxation of real property throughout the City was made in 1967, based upon the assessment information

---

3/ Taxpayers alleged a breach of Article X,§1 of the Constitution of Virginia as well as their federal constitutional rights. Article X,§1, provides, in part:

"...All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax,..."

marshalled at that time; that since 1967 the City had failed to conduct an annual assessment citywide, but on the contrary, had adopted a piecemeal segmental methodology producing a lack of uniformity in real estate tax burdens imposed upon the people. The methodology attacked by Taxpayers is set out in paragraph "Sixth" of the Application. (Appendix E, infra, p.E4-5).

Paragraph "Sixth" alleged that commencing in 1968 the taxing authorities divided the City into geographical segments for the purpose of employing the assessment technique known as "continuous maintenance" or "regular maintenance", however, the technique was not employed annually on an at large basis and, accordingly, the real estate taxes were raised in different years for different geographical segments and as a result of an increase in taxes based on piecemeal segmental assessments, taxpayers owning properties in the Washington Borough were required to pay higher taxes than taxpayers residing in other boroughs, for the years 1972 and 1973. (Application for Relief, Appendix E, infra, p. E 4-5).

The City filed a Demurrer to the application (Appendix F,infra,p.F1-2) which constituted an admission of every allegation of Taxpayers' Application.

The Demurrer relied upon the rulings of the Supreme Court of Virginia in

in Perkins v. County of Albemarle, 214 Va. 240, 198 S.E. 2d 626 (1973) and the opinion on rehearing, 214 Va. 416, 200 S.E. 2d 758 (1973).

In Perkins v. County of Albemarle, supra, the Court held that piecemeal segmental assessment procedures violated Section 168 of the 1902 Constitution of Virginia,now cited as Article X, Section 1.

The Demurrer cited the Virginia Supreme Court's holding on rehearing that:

> "As to cities and counties not parties defendant,our holding has application prospectively only; hereafter, no city or county may employ the implementation methodology we have declared unconstitutional."

apparently construing the opinion as holding there could be no relief on constitutional grounds of a piecemeal segmental assessment system that produced ununiform tax burdens occurring prior to November 26, 1973, the opinion date of the petition for rehearing in Perkins, supra.

On February 11, 1975, Taxpayers filed a petition to the Supreme Court of Virginia for an appeal, which was denied by the Order of the Supreme Court of May 12, 1975, Appendix C-1,infra.

REASONS FOR GRANTING THE WRIT

The effect of the Supreme Court of Virginia denying Taxpayers an appeal of the Order of the Circuit Court of Chesapeake granting a demurrer to Taxpayers' Application was to deprive thousands upon thousands of Virginia land owners of their guarantee to due process and equal protection of the laws pursuant to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

For over 50 years this Court[4/] and the Supreme Court of Virginia[5/] had consistently held that a systematic, intentional, discriminatory tax assessment system was unconstitutional and violated taxpayers' Fourteenth Amendment rights.

4/ Sunday Lake Iron Co.v. Wakefield, 247 U.S. 514, 38 S.Ct. 495, 62 L. Ed. 1154 (1917).

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L. Ed. 340 (1923).

5/ Rixey's Ex'rs. v. Commonwealth, 125 Va. 337, 99 S.E. 573, (1919).

In Sunday Lake Iron Co. v. Wakefield, 247, U.S. 514, 38 S. Ct. 495, 62 L. Ed. 1154 (1917), this Court held:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Raymond v. Chicago Union Traction Co. 207 U.S. 20, 35,36, 52 L. Ed. 78, 87,88, 28 Sup.Ct. Rep.7, 12 Ann. Cas. 757."

See also Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U.S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931).

If the Supreme Court of Virginia had never decided Perkins v. Albemarle, supra, Taxpayers could have raised their constitutional challenges to the piecemeal segmental tax assessment methodology that produced a lack of uniformity in the imposition of real estate taxes in the City of Chesapeake.

The Supreme Court of Virginia has now,

in effect, ruled that Perkins v. Albemarle, supra, deprived Taxpayers and all other citizens similarly situated throughout the Commonwealth of Virginia of their Fourteenth Amendment rights up to November 26, 1973, the date the opinion on the petition for rehearing was handed down by the Supreme Court in that case.

It is, indeed, ironical that the Supreme Court of Virginia, which in 1919 in Rixey's Ex'rs. v. Commonwealth, supra, held that a tax lacking uniformity did violate due process of law and the right to equal protection guaranteed by the federal constitution and grant relief therefor, would in 1975 rule that a lower Court was correct in dismissing Taxpayers' complaint that piecemeal segmental assessments of real estate were lacking in uniformity and violated the federal and state constitutions. Furthermore this conclusion was reached without the Supreme Court of Virginia writing an opinion or citing a single case in support of its action.

It is because Taxpayers have been denied relief in the Courts for rights that were recognized and constitutionally protected for over Fifty years, that Taxpayers now apply to this Court for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

JAMES A. CAPEHART, et al

By: Henry E. Howell, Jr.

Henry E. Howell, Jr.
Counsel for Petitioners

PROOF OF SERVICE

I, Henry E. Howell, Jr., an attorney duly qualified before the Supreme Court of the United States and representing the Petitioners herein, hereby certify that on or before the date of filing of the foregoing Petition I served copies thereof on the parties hereto, and that they are the only persons upon whom service is required to be made, as follows:

1. On the City Of Chesapeake, Virginia, by depositing three copies in a United States Mail Box in a duly addressed envelope, with first class postage pre-paid, to: Messrs, Hunton, Williams, Gay and Gibson, 700 East Main Street, Richmond, Virginia, 23219, and Vernon T. Forehand, Esquire, City Attorney, City of Chesapeake, Virginia, 101 Mt. Pleasant Road,

Chesapeake, Virginia, 23320.

Henry E. Howell, Jr.
808 Maritime Tower
Norfolk, Virginia, 23510

Henry E. Howell, Jr.,
Howell, Anninos, Daugherty & Brown,
808 Maritime Tower,
Norfolk, Virginia, 23510,
Counsel for Petitioners.

APPENDIX

SIXTH JUDICIAL CIRCUIT OF VIRGINIA
Hopewell, Virginia
23860

October 2, 1974

Harry Frazier, III, Esq.
Hunton, Williams, Gay & Gibson
Attorneys at Law
700 E. Main Street
Richmond, Virginia 23219

Honorable Henry E. Howell, Jr.
Howell,Anninos, Daugherty & Brown
Attorneys at Law
Suite 608 Maritime Tower
Norfolk, Virginia 23510

Re: Application of Land Owners,Etc.-No.5459
Circuit Court, City of Chesapeake.

Gentlemen:

The Court is of the opinion that this case is controlled by Perkins v. Albemarle, 214 Va. 416. The Court will, therefore, sustain the demurrer and dismiss the cause of action. Counsel for the City will prepare an order to this effect, submitted same to counsel for the applicants for endorsement.

It therefore appears that the date of October 21 will not be used and is hereby released.

Very truly yours,

(Signed) Ligon L. Jones

Ligon L. Jones

LLJ/cpm

cc: William L. Forbes, Esq., City Attorney
Julian R.Raper,Clerk of the Circuit Court

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE
On the 16th day of October, 1974

In Re:)
)5237-Appl.
APPLICATION OF LAND OWNERS, ETC.)

FINAL ORDER

The Court, upon consideration of the Application of Land Owners filed pursuant to Section 58-1145 of the Code of Virginia of 1950, as amended, the Demurrer of the City of Chesapeake filed in response thereto, Memoranda of Law heretofore submitted and arguments of counsel, is of the opinion that the Application fails to state a cause of action upon which relief can be granted and doth ADJUDGE, ORDER and DECREE that the Demurrer is hereby sustained, the Application is hereby dismissed and the relief prayed for therein is hereby denied, to which action of the Court applicants objected and excepted.

ENTER:

(Signed) Ligon L. Jones
Judge

10/16/74

We ask for this
(Signed) William L. Forbes
Counsel for City of Chesapeake

Seen and objected to:

(Signed) Henry E.Howell,Jr.
Counsel for Applicants

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 12th day of May, 1975.

The petition of James A. Capehart and other owners of real property within the City of Chesapeake, Virginia, for a writ of error to a final order entered by the Circuit Court of the City of Chesapeake on the 16th day of October, 1974, in a certain proceeding then therein depending, entitled, In Re: Application of land owners to the Circuit Court of the City of Chesapeake for relief from erroneous and unconstitutional asseesments, etc., having been maturely considered and a transcript of the record of the final order aforesaid seen and inspected, the court being of opinion that there is no reversible error in the final order complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the final order of the said circuit court.

Record No. 750163

APPENDIX

§58-1145. Application to court to correct erroneous assessment of local levies generally. — Any person assessed with county or city levies or other local taxes on real estate, aggrieved by any such assessment, may, unless otherwise specially provided by law, within two years from the thirty-first day of December of the year in which any such assessment is made, and any person assessed with local levies on personal property or a local license tax, aggrieved thereby, may,within one year from the thirty-first day of December of the year in which such assessment is made, apply for relief to the circuit court of the county or any city court of record of the city wherein such assessment was made. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or if the court in its discretion finds the ends of justice would be met by making an adjustment, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.

In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment on a parcel of real estate is improper or is based on obvious error and

should be corrected in order that the ends of justice may be served, the commissioner shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief for any of several taxpayers. (Code 1919,§§2249, 2389, 2390; 1920,p. 341; 1924,p.589; 1926, p. 644; 1928, p.228; 1936,p.253; 1942, p.610; Tax Code §414; 1968, c.630).

APPENDIX

[For the purposes of brevity, the names of applicants and descriptions of their property are deleted.]

APPLICATION FOR RELIEF

FIRST: - Applicants are owners of real properties within the hereinafter described portion of the Washington District of the City of Chesapeake, Virginia:

> Beginning at a point on the South side of Military Highway, where the same intersects the Southern Branch of the Elizabeth River; and thence in a generally easterly direction along the southern right-of-way of the said Military Highway to its intersection with the right-of-way of Interstate 404; and thence along Interstate 404 in a southeasterly direction to its intersection with Interstate 64; thence crossing over said Interstate 64 to its southerly right-of-way; and thence along said right-of-way in a northeasterly direction to the property now or formerly Mack Truck, Inc.; and thence following the said property line and the property line of others in an easterly direction to its intersection with Tintern Street; and thence southeasterly along the said Tintern Street to its intersection with Battlefield Boulevard; thence crossing over the said Battlefield Boulevard to its easterly right-of-way; thence southerly along said right-of-way to its intersection with Thrasher Road;

thence in an easterly direction along said Thrasher Road to the easterly right-of-way of the Norfolk and Southern Railroad; thence along the easterly right-of-way of said railroad to its intersection with the northerly property line of property now or formerly owned by the Commonwealth of Virginia, better known as the Greenbrier Prison Far; and thence along said property line in a northerly direction to its intersection with Greenbrier Road; thence along said Greenbrier Road in a southerly direction to its intersection with the southerly line of the property owned by the Irving Co., better known as Greenbrier Farm Tract; thence in an Easterly and Northerly direction along said property line to its intersection with the City line between Chesapeake and Virginia Beach; thence in a southerly and easterly direction along said corporate line to its intersection with the North Landing Creek; thence northerly and westerly along said creek and the Chesapeake and Albemarle Canal to its intersection with the Southern Branch of the Elizabeth River; thence continuing in a westerly and northerly direction along the last mentioned river to its point of beginning.

SECOND: - Each of the parties named in this Article Second have been aggrieved by the erroneous and unconstitutional assessments of our respective properties,

the taxes based upon which assessments became due and payable on December 5, 1972, and we petition this Honorable Court pursuant to §58-1145 of the Code of Virginia to adjudicate that the said assessments are not uniform in application, are erroneous under the laws of Virginia and unconstitutional under the Constitutions of the Commonwealth of Virginia and the United States. A designation of these applicants and their properties are as follows:

Name	Properties
* * *	* * *

THIRD: - Each of the parties named in this Article Third have been aggrieved by the erroneous and unconstitutional assessments of our respective properties, the taxes based upon which assessments became due and payable on December 5, 1973, and we petition this Honorable Court purusant to §58-1145 of the Code of Virginia to adjudicate that the said assessments are not uniform in application, are erroneous under the laws of Virginia and unconstitutional under the Constitutions of the Commonwealth of Virignia and the United States. A designation of these applicants and their properties are as follows:

Name	Properties
* * *	* * *

FOURTH: - In 1964, the City of Chesapeake enacted Code Section 10--44, providing as follows:

"There shall be an annual assessment of real estate for

local taxation in the city, which shall be made as provided in this article."

Pursuant to the law made and provided, the City of Chesapeake proceeded to assess all properties within the jurisdiction of the City of Chesapeake and upon completion of said assessment did uniformly tax real property throughout said city on the basis of said assessment in or about the year 1967.

FIFTH: - Since 1967 there has been no annual uniform assessment of real estate, but on the contrary the City has adopted a piecemeal segmental assessment methodology that violates the constitution and laws of the State of Virginia, which required all taxes to be uniform upon the same class of subjects within the territorial limits of the authority levying the taxes.

SIXTH: - Commencing in or about 1968, the City of Chesapeake began to break down the City into geographical segments for the purpose of employing the assessment technique of "continuous maintenance." or as the technique is sometimes described "regular maintenance". Contrary to law, this technique was not employed annually on a jurisdictional at large baiss, but in the years here involved was applied to the geographical segment in which the applicant's properties are situated to the exclusion of properties located in the remainder of the City of Chesapeake. Said method of assessment is unconstitutional by reason of being conducted pursuant to a piecemeal segmental assessment methodology. The general description of the geographic segment within which applicants' properties are located and which were subjected to the piecemeal segmental

assessment methodology is set forth in Article First hereof.

SEVENTH: - As a result of the aforesaid illegal and unconstitutional assessments applicants taxes on their aforeaid properties were illegally raised.

WHEREFORE, applicants pray that this Court exercise the jurisdiction bestowed upon it by §58-1145 of the Code of Virginia to grant relief to your applicant taxpayers by

(1) Decreeing that the piecemeal segmental assessment methodology heretofore referred to be illegal and unconstitutional;

(2) Directing the appropriate officers of the City of Chesapeake, Virginia, to correct the piecemeal segmental assessment methodology;

(3) Directing the proper officers of the City of Chespaeake, Virginia, to refund all such taxes as your applicants have paid in excess of the taxes for the last prior general assessment applied uniformly to the City of Chesapeake at large in or about the year 1967.

/s/ Henry E. Howell,Jr.
Henry E. Howell, Jr.,
Of Counsel for Applicants
Herein.

I hereby certify that I have requested the Sheriff of the City of Chesapeake, Virginia, to serve a copy of the within Application For Relief upon the following: Robert H. Waldo, Commissioner of the Revenue, City of Chesapeake, Chesapeake, Virignia; Durwood S. Curling, City Manager, City of Chesapeake, Chesapeake, Virginia; William L. Forbes, City Attorney, City of Chesapeake, Chesapeake, Virginia.

/s/ Henry E. Howell, Jr.
Henry E. Howell, Jr.

APPENDIX

DEMURRER

The defendant City of Chesapeake, Virginia, by counsel, says that the Application for Relief is not sufficient in law for the following reasons:

(1) In the event this Court should find, in a proper proceeding for that purpose, that the defendant has employed prior to November 26, 1973, a "piecemeal segmental assessment methodology", as alleged in paragraph SIXTH of the Application for Relief, this finding would not afford any basis for refunds of taxes assessed for 1972 or 1973. In Perkins v. County of Albemarle, 214 Va. 416 (November 26, 1973), in which the Supreme Court of Virginia held that such assessment methodology violates the uniformity mandate of the Virginia Constitution and upon which the Application for Relief is based, the Court specifically ruled that "As to cities and counties not parties defendant (to that proceeding), our holding has application prospectively only; hereafter, no city or county may employ the implementation methodology we have declared unconstitutional." 214 Va. 416, 418.

(2) The relief sought in paragraphs (1) and (2) of the prayer of the Application for Relief--to-wit, a decree that the alleged "piecemeal segmental assessment methodology" is illegal and unconstitutional and an order directing the defendant to correct such methodology--is not authorized or permitted in a proceeding under Section 58-

1145 of the Code of Virginia. Section 58-1145 is limited to the correction of an erroneous assessment on the specific property involved.

WHEREFORE, the defendant respectfully prays:

(1) The Application for Relief should be dismissed as failing to state a cause of action.

(2) In the event the Application for Relief is not dismissed, paragraphs (1) and (2) of the prayer be stricken as failing to state grounds for relief that can properly be granted in this proceeding.

CITY OF CHESAPEAKE, VIRGINIA

By: (Signed) William L. Forbes
Of Counsel

Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

In The

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October Term, 1975

No. 75-210

JAMES A. CAPEHART, ET AL.,
Petitioners,

v.

CITY OF CHESAPEAKE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT CITY OF CHESAPEAKE IN OPPOSITION

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Dated: September 5, 1975

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In The

Supreme Court of the United States

October Term, 1975

No. 75-210

JAMES A. CAPEHART, ET AL.,
Petitioners,

v.

CITY OF CHESAPEAKE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT CITY OF CHESAPEAKE IN OPPOSITION

The City of Chesapeake hereby respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

I.

QUESTIONS PESENTED

1. Whether this Court will review a state court's decision when no federal question was raised or considered below.

2. Whether any federal right is denied by the Virginia Supreme Court's declaring its decision of Virginia law to be prospective only.

II.
STATEMENT OF THE CASE

Following the Virginia Supreme Court's opinion in *Perkins* v. *County of Albem*arle, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973) holding that Albemarle County's geographical assessment methodology violated the uniformity provision of the Virginia Constitution,[1] Petitioners[2] filed their Application for Relief in the State court, quoting extensively from the *Albemarle* opinion when making their allegations of fact. The City demurred on the ground, *inter alia,* that Taxpayers had based their Application on the *Albemarle* case which the Virginia Supreme Court in its rehearing opinion had made prospective only. The effect of the City's demurrer was to say that, even if its methodology were conceded to be piecemeal and segmental and therefore in violation of the Virginia Constitution under *Albemarle,* the Taxpayers had no remedy in light of the Virginia Court's holding on prospectivity. On the basis of memoranda and oral argument, the trial judge agreed and sustained the City's demurrer.

Taxpayers filed a Petition for Appeal to the Virginia Supreme Court, arguing that their Application stated a cause of action under the Virginia Constitution. No argument was advanced that Taxpayers' Application stated a cause of action under, or that the trial court's ruling had denied them any right secured by, federal law. [A copy of the Taxpayers' Petition for Appeal is reprinted in the Appendix hereto for the convenience of this Court.] The Virginia Supreme Court, considering only the grounds of State law presented, found no error and denied the appeal.

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[1] Constitution of Virginia (1971) art. X, § 1.

[2] Hereinafter, Petitioners will be referred to as "Taxpayers" and Respondent, the City of Chesapeake, as the "City."

III.
ARGUMENT

A.
Taxpayers Did Not Raise A Federal Question In The Court Below

While the second and third paragraphs of Taxpayers' Application invoked the trial court's jurisdiction to determine issues of federal and Virginia constitutional law, it was apparent that the Application was grounded in the Virginia Constitution only. Taxpayers' Application was patterned after *Perkins* v. *County of Albemarle,* 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973), a case decided on the basis of the uniformity provision of the Virginia Constitution. The Application even quoted repeatedly the Virginia Supreme Court's rubric "piecemeal, segmental assessment methodology." The City's demurrer asserted that the Taxpayers' case was grounded on the *Albemarle* case, and the trial judge so held.

On appeal to the Virginia Supreme Court Taxpayers reaffirmed that their case was founded on State law, saying in their Petition for Appeal [Appendix, *infra,* p. 2]:

> "Taxpayers' " application was rooted in Article X, Section 1 of the Constitution of Virginia . . . .

No claim was made to any right or privilege under the Constitution or laws of the United States. Indeed, reference to the Table of Citations in the Taxpayers' Petition for Appeal discloses that not a single federal case, constitutional provision or statute was cited to the Virginia Supreme Court. If Taxpayers even pleaded a federal question, that point was not pressed in the trial court and was clearly abandoned on appeal to the Virginia Supreme Court. In

both Virginia courts the taxpayers relied exclusively on the uniformity requirements of the Virginia Constitution.

Since no federal question was presented to or passed upon by the Virginia Supreme Court, this Court should decline to review the decision below. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Herndon* v. *Georgia,* 295 U.S. 441 (1935).[3] Not only does the record fail to disclose that the court below passed upon a federal question as required by this Court, *see, e.g., Bailey* v. *Anderson,* 326 U.S. 203 (1945), the record affirmatively shows that the court below did not. This Court has consistently refused to decide federal issues raised for the first time on review of state court decisions, *Cardinale* v. *Louisiana, supra,* and cases cited therein at 438. It should likewise refuse to do so here.

B.

The Virginia Supreme Court's Decision To Make Its Holding Of Virginia Law Prospective Only Does Not Deny Taxpayers Any Federal Right

The Virginia Supreme Court's landmark decision in *Perkins* v. *County of Albemarle*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing,* 214 Va. 416, 200 S.E.2d 566 (1973) was in sharp contrast to the rulings of a number of state courts upholding cyclical assessment methodologies.[4] *E.g., State* ex rel. *Park Investment Co.* v. *Board*

[3] Taxpayers' Petition for Certiorari, at 5, erroneously asserts that this Court has jurisdiction to review the judgment of the Virginia Supreme Court under 28 U.S.C. § 1254(1) (1970). This is clearly not the case. If this Court has jurisdiction at all, it is by 28 U.S.C. § 1257(3) (1970). Under either statutory provision, federal questions not presented in the court below should not be considered by this Court. *See, e.g., Cardinale* v. *Louisiana, supra; McCullough* v. *Kammerer Corp.,* 323 U.S. 327 (1945).

[4] In a purely geographical or cyclical methodology, the taxing jurisdiction is divided into a number of segments and appraisals are made in only one geographical segment each year. Taxes are assessed on the basis of the most recent appraisal. Thus, a jurisdiction operating on a three year cycle will always be taxing one-third of its properties on the basis of current valuations and two-thirds on the basis of appraisals made in earlier years.

of Tax Appeals, 32 Ohio St. 2d 28, 289 N.E.2d 579 (1972); *Carkonen* v. *Williams,* 76 Wash. 2d 617, 458 P.2d 280 (1969); *Skinner* v. *New Mexico Tax Comm'n,* 66 N.M. 221, 345 P.2d 750 (1959); *Rogan* v. *County Comm'rs,* 194 Md. 299, 71 A.2d 47 (1950); *Hamilton* v. *Adkins,* 250 Ala. 557, 35 So. 2d 183, *cert. denied,* 335 U.S. 861 (1948). Since this Court had approved, absent some showing of intentional discrimination, a methodology which did not reassess all properties within the jurisdiction in one year, *Sunday Lake Iron Co.* v. *Township of Wakefield,* 247 U.S. 350 (1918), the *Albemarle* case applies a more stringent test under the Virginia Constitution than is required under the Fourteenth Amendment of the United States Constitution.

Stunned representatives of Virginia State and local government joined Albemarle County in seeking a rehearing.[5] Following argument on rehearing, the Virginia Supreme Court stood by its holding. But moved by the specter of financial chaos in local government, it made its decision prospective only as to non-party litigants. *Perkins* v. *County of Albemarle,* 214 Va. 416, 418, 200 S.E.2d 566, 568 (1973).

Applying a decision announcing new principles of law prospectively is within the discretion of a court of last resort to avoid inequities and provide for the orderly administration of government. It is a remedy frequently employed by this Court, *see, e.g., Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), and cases cited and discussed therein

[5] Amicus briefs in support of Albemarle County's Petition for Rehearing were filed by the Attorney General of Virginia, the Virginia Municipal League, the Virginia Association of Counties and the Virginia Association of Assessing Officers.

at 105-106, and by state supreme courts. *See, e.g., Russman* v. *Luckett,* 391 S.W.2d 694, 699 (Ky. 1965); *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P.2d 1241, 1266 (1971); *Robinson* v. *Cahill,* 62 N.J. 473, 303 A.2d 273, 298, *cert. denied,* 414 U.S. 976 (1973). The Virginia Supreme Court's denial of relief to Taxpayers by applying its holding in the *Albemarle* case prospectively only states no claim under the United States Constitution. As was said in *Great Northern R.R.* v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 364 (1932):

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal Constitution.

The effect of the City's demurrer was to admit for purposes of the demurrer that its assessment methodology was piecemeal, segmental and non-uniform under the Virginia Constitution.[6] This admission, however, was of no avail to the Taxpayers in light of the Virginia Supreme Court's decision to make its holding in the *Albemarle* case prospective only. This is a question of Virginia law which denies Taxpayers no federal rights and which this Court has no jurisdiction to review.

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[6] The City emphatically denies that its assessment methodology is piecemeal, segmental or non-uniform. Its assessment methodology actually ranks well in the Commonwealth of Virginia and the United States. The *1973 Virginia Sales Assessment/Sales Ratio Study,* an annual publication of the Virginia Department of Taxation, shows that the index of inequality (also referred to as a coefficient of dispersion) for the City was 13.7% with a regression index of 0.99. Experts in the assessment field generally recognize that less than 20% shows an acceptable degree of uniformity; less than 15% is good; and less than 10% is excellent. The regression index measures the relationships between assessments of high priced versus low priced real estate. A value of 1.00 indicates absolute uniformity. Chesapeake's .99 shows near perfection.

IV.

CONCLUSION

Taxpayers below grounded their case solely on their rights under State law and fell squarely within the ambit of the Virginia Supreme Court's discretionary ruling. They cannot raise federal questions for the first time in this Court in an effort to gain the forum denied by State law. The Supreme Court of Virginia wisely determined to make its decision of State law prospective in application to avoid fiscal chaos. This decision is peculiarly within the province of the Virginia Court in dealing with matters of a purely local nature. It presents no denial of due process or any other federal right. For these reasons the writ should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Harry Frazier, III, counsel for the Respondent and a member of the bar of the Supreme Court of the United States, hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of the United States all parties required to be served have been served with copies of the foregoing Brief for Respondent City of Chesapeake in Opposition by mailing three copies thereof by first class mail, postage prepaid, to Henry E. Howell, Jr., Esquire, Howell, Anninos, Daugherty & Brown, 808 Maritime Tower, Norfolk, Virginia 23510, counsel of record for Petitioners, this fifth day of September, 1975.

HARRY FRAZIER, III
Counsel for the
City of Chesapeake

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* * *

PETTTION FOR APPEAL

I.

STATEMENT OF MATERIAL PROCEEDINGS

Appellants herein are a group of taxpayers owning properties within a portion of Washington District of the City of Chesapeake and will hereafter be referred to as "Taxpayers."

"Taxpayers" filed an application for relief from erroneous unconstitutional assessments of their land and alleged that the assessments in the City of Chesapeake were not uniform. The application was filed pursuant to Section 58-1145 of the Code of Virginia.

The City of Chesapeake filed a demurrer to the application alleging the application did not state a cause of action under Section 58-1145.

After hearing, Judge Ligon L. Jones, who was designated to sit in the case, entered final order sustaining the demurrer and dismissed "Taxpayers" application for relief.

"Taxpayers" seasonably noted this appeal.

II.

ASSIGNMENTS OF ERROR AND QUESTIONS PRESENTED

"Taxpayers" assigned as error, the following:

"1. The Court erred in entering its Order of October 16, 1974, sustaining the demurrer of the defendant, City of Chesapeake, Virginia, dismissing landowners' Application and denying the relief therein prayed for."

The sole question presented by this appeal is whether or not "Taxpayers" application stated a cause of action.

III.

STATEMENT OF FACTS

The posture of the pleadings required the City of Chesapeake to accept the allegations contained in "Taxpayers" pleading as admitted.

These facts are:

1. Applicants were all owners of real properties within the described portion of the Washington District of the City of Chesapeake.

2. That each of the properties had been subjected to erroneous and unconstitutional assessments.

3. The assessments were not uniform in application.

4. That in 1964 the City of Chesapeake enacted an ordinance requiring the annual assessment of all real estate within the City.

5. Since 1967 there was no annual uniform assessment of real estate in the City of Chesapeake.

6. Commencing in or about 1968, the City of Chesapeake engaged in a method of assessment pursuant to a piecemeal, segmental assessment methodology.

7. As a result of the erroneous and unconstitutional assessment "Taxpayers" taxes on the properties involved were illegally raised.

IV.

ARGUMENT

A.

"Taxpayers' " Application Stated A Cause Of Action.

"Taxpayers' " application was rooted in Article X, Section 1 of the Constitution of Virginia, which provides, in part:

> "* * * All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, * * *"

This constitutional guarantee has existed in Virginia for many years.

From time to time the legislature has framed remedies to assist the taxpayer in procuring the benefits of the guarantee.

One remedy which was designed to afford taxpayers an economical and expeditious method of securing their right to uniform taxation is Section 58-1145 of the Code of Virginia.

On March 5, 1975, when "Taxpayers" application was filed, the section read as follows:

> "Application to court to correct erroneous assessments of local levies generally.—Any person assessed with county or city levies or other local taxes on real estate, aggrieved by any such assessment, may, unless otherwise specially provided by law, within two years from the thirty-first day of December of the year in which any such assessment is made, and any person assessed with local levies on personal property or a local license tax, aggrieved thereby, may, within one year from the thirty-first day of December of the year in which the assessment is made, apply for relief to the circuit court of the county or any city court of record of the city wherein such assessment was made. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or if the court in its discretion finds the ends of justice would be met by making an adjustment, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.

> In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment on a parcel of real estate is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, the commissioner shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief for any of several taxayers."

The language of the first paragraph reading:

> "* * * or if the court in its discretion, finds the ends of justice would be met by making an adjustment, * * *"

were added by the General Assembly in 1968. However, applicants are not relying on this language. This language was found unconstitutional by reason of vagueness and in 1974 the legislature passed an amendment that substituted the words:

> "* * * or that the assessment is otherwise invalid or illegal, * * *"

The bill contained an emergency clause and the amendment became effective April 4, 1974.

Commencing in or about 1968, the City of Chesapeake began to break down the City into geographical segments for the purpose of employing the assessment technique of "continuous maintenance" or as the technique is sometimes described "regular maintenance." Contrary to law, this technique was not employed annually on a jurisdictional at large basis, but in the years here involved was applied to the geographical segment in which the applicant's properties are situated to the exclusion of properties located in the remainder of the City of Chesapeake. Said method of assessment is unconstitutional by reason of being conducted pursuant to a piecemeal segmental assessment methodology.

"Taxpayers" alleged that the procedure of assessing a different area of the City each year produced an unconstitutional lack of uniformity in their tax bills that became due and payable December 5, 1973, and in some instances bills that became due and payable on December 5, 1972.

Section 58-1145 afforded a specific remedy whenever assessment of real estate was not uniform in its application.

The Application contained clear allegations of a lack of uniformity and was not subject to demurrer.

B.

Section 58-1145 Was An Ideal Remedy Available To "Taxpayers."

Section 58-1145, which had its origins as Tax Code Section 414 prior to recodification of the Code of Virginia, was the ideal remedy to procure the benefits guaranteed to "Taxpayers" under the Constitutions of both Virginia and the United States.

In *Chesapeake and Potomac Telephone Company of Virginia* v. *City of Newport News,* 194 Va. 409 (1952), this Court stated:

> "Relief under these statutes is not confined to the correction of an assessment which is merely erroneous. They embrace also levies and assessments claimed to be unconstitutional, illegal and void. * * *
>
> "The object of these statutes was to furnish an expeditious and inexpensive remedy against taxes which have been assessed or collected. They are to be liberally construed in order to further the remedy so provided. * * *"

In *Carl L. Todd* v. *County of Elizabeth City,* 191 Va. 52 (1950), this Court considered the propriety of seeking tax relief from the alleged unconstitutional assessment of real estate to cover the cost of collecting garbage through a bill

in equity. Defendants filed demurrer to the bill on the ground the plaintiffs had an adequate remedy at law and the lower court overruled the demurrer, but this court reversed the lower court and sustained the demurrer. In its opinion this Court pointed to Section 58-1145, formerly Tax Code Section 414, as amended, stating at page 56:

> "Taxpayers were granted relief under section 414 from local levies and assessments held to be unconstitutional and void. * * *"

C.

"Taxpayers" Right To Recover Illegally Collected Taxes Was Not Proscribed By Perkins v. Albemarle County.

The City's demurrer alleged that the relief "Taxpayers" sought was barred by the opinion on rehearing by this Court in *Perkins* v. *Albemarle County,* 214 Va. 416 (1973), by reason of the ruling being prospective only.

Perkins v. *Albemarle County* merely illuminated a remedy and right which "Taxpayers" were entitled to for many years as underscored by numerous opinions prior to *Perkins.*

In *Rixey's Executors* v. *Commonwealth of Virginia,* 125 Va. 337 (1919) in a proceeding for a relief from taxes on certain intangible property based upon alleged erroneous assessments between the years 1911 and 1917, the Court said at page 352:

> "* * * 'An examination of those authorities * * * discloses that it is a systematic, intentional discrimination, by those administering the tax system of a State (whether as directed by statute or contrary to statute) against a person, by an assessment of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, which is condemned by such authorities and held to be a

> denial to the person first referred to of the due process of law and the equal protection of the laws guaranteed to them by the federal Constitution.' * * *."

See also *Richmond* v. *Eubank,* 179 Va. 70 (1942), where petitioner sued for a refund of sewer taxes after a decision by this Court declaring the ordinance imposing the sewer taxes void. The action was brought under Section 414 of the Tax Code, which is now incorporated into Sections 58-1145 - 58-1151. The defendant, City, argued that a one year statute of limitation was applicable, and that petitioner was barred from relief because suit was not instituted in time. The Court held that a two year statute of limitation controlled, and suit was, therefore, timely filed. But even if the one year statute did apply, the Court said, plaintiff was not barred from relief, at page 84:

> "* * * The ordinance imposing the sewer tax being unconstitutional, 'it is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' *Campbell* v. *Bryant,* 104 Va. 509, 516, 52 S.E. 638.
>
> "This being true, there is no ordinance in force, within the purview of Code sec. 6336 to be construed. All sums collected under the ordinance are sums illegally collected and held by the city. * * *"

"Taxpayers" again emphasize that the *Perkins* decision was declarative of no new substantive rights and could not and did not erode "Taxpayers" rights under Section 58-1145.

V.

CONCLUSION

For the reasons stated this Court should, as promptly as possible, overrule the Order of the Lower Court dismissing "Taxpayers' " Application and remand the cause for a prompt determination of "Taxpayers' " rights.

Respectfully submitted,

APPLICANTS,

By: /s/ HENRY E. HOWELL, JR.
Of Counsel